



**Office of the Attorney General
State of Texas**

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March 31, 1995

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Committee on Nominations
Texas State Senate
P.O. Box 12068
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Honorable John T. Montford
Chair
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Honorable Gonzalo Barrientos
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Texas State Senate
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Letter Opinion No. 95-024

Re: Whether, pursuant to article IV, section 12 of the Texas Constitution, gubernatorial appointments to the Coastal Coordination Council are subject to the advice and consent of the senate and related questions (ID# 31959)

Gentlemen:

You ask this office to consider whether, consistent with article IV, section 12 of the Texas Constitution, gubernatorial appointments to the Coastal Coordination Council (the "council") require the advice and consent of the senate even though the statute enabling the council, Natural Resources Code chapter 33, subchapter F, does not explicitly require senate confirmation. We understand that in 1994, a year in which the Texas Legislature was not in session, Governor Richards reappointed two individuals for two-year terms to the council.¹ Governor Richards did not submit the names of these two appointees to the Texas Senate within the first ten days of the seventy-fourth legislative

¹Briefs submitted in connection with Senator Bivins' letter suggest that questions exist with regard to the validity of the governor's original appointment of these two individuals in 1992. We understand that the governor did not submit the names of the appointees to the senate in 1993 for its advice and consent. None of you ask us about the validity of the original appointments, however, and we therefore do not consider that issue in this opinion.

session. Her successor, Governor Bush, has submitted to the senate the names of two other individuals he proposes to appoint to the council in place of Governor Richards' 1994 appointees.

Article IV, section 12 states in pertinent part as follows:

(a) All vacancies in State or district offices, except members of the Legislature, shall be filled unless otherwise provided by law by appointment of the Governor.

(b) An appointment of the Governor made during a session of the Senate shall be with the advice and consent of two-thirds of the Senate present.

(c) In accordance with this section, the Senate may give its advice and consent on an appointment of the Governor made during a recess of the Senate. To be confirmed, the appointment must be with the advice and consent of two-thirds of the Senate present. If an appointment of the Governor is made during the recess of the Senate, the Governor shall nominate the appointee, or some other person to fill the vacancy, to the Senate during the first ten days of its next session following the appointment. If the Senate does not confirm a person under this subsection, the Governor shall nominate in accordance with this section the recess appointee or another person to fill the vacancy during the first ten days of each subsequent session of the Senate until a confirmation occurs. If the Governor does not nominate a person to the Senate during the first ten days of a session of the Senate as required by this subsection, the Senate at that session may consider the recess appointee as if the Governor had nominated the appointee.

....

(i) For purposes of this section, the expiration of a term of office or the creation of a new office constitutes a vacancy.

We must ascertain initially whether a member of the council holds a "state or district office." If we determine that membership on the council is a state or district office, we must determine whether, when a statute is silent as to the necessity for senate confirmation of a gubernatorial appointment, the constitution nevertheless requires such confirmation.

The Coastal Coordination Council was created by the Coastal Public Lands Management Act of 1973, which is presently codified as subchapters A through E of chapter 33 of the Natural Resources Code. The members of the council include the commissioner of the General Land Office, the attorney general, the chair of the Parks and

Wildlife Commission, the chair of the Texas Water Commission (now the TNRCC), one member of the Railroad Commission, "and one city or county elected official and one resident from the coastal area appointed by the governor for two-year terms." Nat. Res. Code § 33.203(2).

The council has several duties. It is to promulgate rules adopting the goals and policies of the coastal management plan that the commissioner of the General Land Office has developed in accordance with section 33.053. *Id.* § 33.204(a). In addition, the council is to study problems and issues affecting the management of coastal natural resource areas. *Id.*

The council also has duties related to the oversight of state agencies and political subdivisions. It is directed to review any action a state agency or subdivision has taken or authorized that may adversely affect coastal natural resource areas and that the commissioner of the General Land Office or three regular members of the council have submitted to the council. *Id.* § 33.205(a), (b). In its review, the council is to ensure the actions comply with the goals and policies of the coastal management plan. *Id.* § 33.205(a). Any action the council protests is remanded to the state agency or subdivision that took or authorized the action. *Id.* § 33.206(b). The council may review the state agency's or subdivision's action on remand. *Id.* § 33.206(c). The council may request the attorney general to file an action against the agency or subdivision to enforce chapter 33, subchapter F. *Id.* § 33.208.

Similarly, the council must review any federal action the commissioner of the General Land Office submits to the council. *Id.* § 33.206(d). It may refer to and attempt to resolve with the appropriate federal official any federal action it finds does not comply with the goals and policies of the coastal management plan. *Id.*

With regard to whether a member of the council holds a "state or district office," we believe Attorney General Opinion O-5153 (1943) is instructive. There, this office was asked to determine whether, for purposes of article IV, section 12 of the Texas Constitution, the office of public weigher is a "state or district office." Relying for the most part upon *Lane v. McLemore*, 169 S.W. 1073 (Tex. Civ. App. 1914, no writ), the opinion concluded that the question of whether an individual holds a state or district office, in contrast to a county, municipal, or other "local" office, is dependent primarily upon the geographic extent of the officer's functions and duties. *See Lower Colorado River Authority v. McCraw*, 83 S.W.2d 629 (Tex. 1935); *see also Ex parte Preston*, 161 S.W. 115 (Tex. Crim. App. 1913).

Chapter 33, subchapter F does not limit the jurisdiction of the council to a single county or municipality. Rather, the council's jurisdiction includes all coastal natural resource areas. *See* Nat. Res. Code § 33.203(1) (defining "coastal natural resource areas" to incorporate all areas designated in coastal management plan as requiring special management). Furthermore, the council may review the actions of any state agency and

any political subdivision that may adversely affect coastal natural resource areas. *See id.* § 33.205(a). The General Land Office, an agency with statewide jurisdiction, *see* Tex. Const. art. IV, § 23 (categorizing Commissioner of General Land Office with “statutory State officer[s]”); Nat. Res. Code §§ 31.011, .051 (establishing General Land Office and assigning duties), assists the council in the execution of its duties. *See id.* § 33.204(d). A party aggrieved by a final action of the council may appeal to a district court in accordance with the Administrative Procedure Act, Gov’t Code ch. 2001, an act designed to “provide minimum standards of uniform practice and procedure for state agencies” and to “restate the law of judicial review of state agency,” Gov’t Code § 2001.001(1), (3). *See* Nat. Res. Code § 33.207. The council may be represented in court by the attorney general. *Id.* § 33.208.

Additionally, five of the seven members of the council are officials elected on a state-wide basis, chair agencies with state-wide jurisdiction, or are members of such agencies who hold their positions without regard to their geographic origins. Only the two appointed members, who must reside within the coastal area, represent primarily coastal area interests. *See id.* § 33.203(2). The more localized nature of these two appointments does not, however, dictate that membership on the council is other than a state office. Rather, the nature of the council as a total entity--its jurisdictional breadth and its geographically diverse membership--as well as the relevant statutory provisions considered in aggregate, convince us that the legislature deemed it to be a state entity. We conclude, therefore, that a member of the council holds a state office for purposes of article IV, section 12 of the Texas Constitution.²

We next consider whether the senate must confirm gubernatorial appointments to the council. Although nothing in chapter 33, subchapter F expressly requires senate confirmation, we believe that article IV, section 12 of the Texas Constitution so requires.

The court of civil appeals discussed article IV, section 12 in *Denison v. State ex rel. Allred*, 61 S.W.2d 1017 (Tex. Civ. App.--Austin), *writ ref’d n.r.e. per curiam*, 61 S.W.2d 1022 (1933), and its comments, while dicta, are instructive here. The court in *Denison* considered Governor Ferguson’s appointment to the office of commissioner of

²Whether membership on the council is an “office” does not seem to be in dispute. Under the test adopted by the Supreme Court in *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955), a public officer is an individual upon whom the legislature has devolved any sovereign function of government that the individual is to exercise for the benefit of the public and largely independent of the control of others. *See also Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App.--Galveston 1949, *writ ref’d*). An individual who serves in a merely advisory capacity does not exercise sovereign powers independent of the control of others and thus is not an officer. Attorney General Opinion DM-218 (1993) at 4; *see* Attorney General Opinions DM-149 (1992) at 3-4; DM-49 (1991) at 5. Furthermore, under state law, a public officer generally serves for a fixed term and may be removed from office only in accordance with law. Attorney General Opinions DM-218 (1993) at 4 (citing *Aldine*, 280 S.W.2d at 578); DM-149 (1992) at 3 (citing *Aldine*, 280 S.W.2d at 578).

the State Highway Commission. *Id.* at 1020. Article 6664, V.T.C.S., the statute under which the governor made the appointment, required the governor to appoint members to the highway commission “with the advice and consent of the Senate.” *Id.*; *see also* V.T.C.S. art. 6664(a). On the other hand, of course, article IV, section 12 of the constitution requires the “advice and consent of two-thirds of the senate present” for an appointment to be confirmed. *Denison*, 61 S.W.2d at 1020. Although two-thirds of the senate had not voted to approve Denison’s appointment, Denison argued that because a majority of the senate had voted to approve his appointment the senate had confirmed his appointment under article 6664, V.T.C.S. *Id.* at 1018.

The court rejected Denison’s argument:

We think the language of section 12, art. 4, of the Constitution is plain, clear, unambiguous, and capable of but one construction. That the clause “unless otherwise provided by law” refers to the nominating authority, and has no reference to “the advice and consent of two-thirds of the senate present.” This language clearly contemplates that the Legislature may, should it see fit, provide by law for the filling of offices created by it otherwise than by appointment by the Governor, and in such event confirmation by the Senate is not essential. . . . But where [the] appointment . . . is not “otherwise provided by law,” that power rests with the Governor. And the clear import, language, and requirement of the Constitution is that *any and every appointment by the Governor to fill a vacancy in a state or district office must be with the advice and consent of two-thirds of the Senate* as in said section 12 provided.

Id. at 1020-21 (emphasis added); *see also White v. Sturns*, 651 S.W.2d 372, 375 (Tex. App.--Austin 1983, writ ref’d n.r.e.) (stating that every appointment of public officer under article IV, section 12 results from nomination by governor, submitted to senate for its advice, consent, and confirmation).

The law in Texas thus is clear: Article IV, section 12 mandates that the senate confirm every gubernatorial appointment to a state or district office in the executive or judicial branch of government. The phrase in article IV, section 12(a), “unless otherwise provided by law,” permits the legislature to delegate, by statute, the appointing power to an officer other than the governor, but it does not permit the legislature to statutorily bypass the senate confirmation process.

Senators Montford and Barrientos ask whether Governors Richards’ and Bush’s appointments, respectively, are recess appointments subject to article IV, section 12(c), or session appointments subject to article IV, section 12(b). However the appointments are characterized—whether recess, session, or a hybrid thereof—the senators ask about

characterized--whether recess, session, or a hybrid thereof--the senators ask about Governor Bush's authority to nominate individuals other than those previously appointed by Governor Richards.

Certainly, the individuals Governor Richards selected to fill vacancies during a legislative recess are persons properly denominated "recess appointees." Article IV, section 12(c) requires the governor to submit to the senate the name of every recess appointee, "or some other person," within ten days of the commencement of the first legislative session following the appointment. Thus, article IV, section 12(c) expressly contemplates that the governor may nominate to the senate individuals other than those whom the governor had appointed originally to fill the vacancies. Clearly, Governor Bush is authorized to nominate, within ten days of the commencement of the first legislative session after the recess appointments, for membership on the council individuals other than those Governor Richards appointed in 1994.³

S U M M A R Y

A member of the Coastal Coordination Council holds a state office for purposes of article IV, section 12 of the Texas Constitution. Pursuant to that provision, the governor must submit to the senate, for its advice and consent, the names of his or her appointees to the council. Article IV, section 12 authorized Governor Bush, within ten days of the commencement of the legislative session, to nominate to the council individuals other than those Governor Richards appointed during the legislative recess.

Yours very truly,



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Prepared by: Kymberly K. Oltrogge

³We have been informed that Governor Bush submitted his nominations to the senate within the ten-day period established in article IV, section 12(c). Therefore, we need not address any further legal issues regarding the submission. If Governor Bush had not submitted his appointments to the senate within ten days of the commencement of the legislative session, then, pursuant to the last sentence of article IV, section 12(c), the senate would consider Governor Richards' recess appointees "as if the Governor had nominated the appointee."

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Honorable John T. Montford
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